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No. 02-749

IN THE
Supreme Court of the United States

RAYTHEON COMPANY, ET AL.,
Petitioners,

v.

JOEL HERNANDEZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. AN EMPLOYER'S APPLICATION OF ITS "INELIGIBLE FOR REHIRE" POLICY TO A FORMER EMPLOYEE TERMINATED FOR VIOLATING A WORKPLACE CONDUCT RULE SUCH AS A PROHIBITION ON DRUG USE DOES NOT VIOLATE THE AMERICANS WITH DISABILITIES ACT	6
A. The ADA Does Not Shield Employees Who Violate Company Conduct Rules From the Consequences of Their Actions	6
1. Employers May Enforce Rules Against Drug and Alcohol Use and Other Workplace Misconduct, Even if the Misconduct Is Traceable to a Disability	6
2. EEOC Guidance Confirms That the ADA Permits Enforcement of Conduct Standards and Does Not Require Pardons Due to Disability	13
B. For the Same Reasons, Refusing To Rehire a Former Employee Terminated for Workplace Misconduct Does Not Violate the ADA	15

TABLE OF CONTENTS—Continued

	Page
II. EMPLOYERS HAVE AN IMPORTANT BUSINESS NEED FOR THE ABILITY TO REFUSE TO REHIRE FORMER EMPLOYEES WHO WERE DISCHARGED FOR VIOLATING WORKPLACE CONDUCT RULES	17
A. Employers Establish Work Rules for Legitimate and Nondiscriminatory Business Reasons	17
B. Considering Employees Who Have Been Terminated for Misconduct as Ineligible for Rehire Is a Common Practice Grounded in Legitimate Business Purposes	18
C. A Decision Preventing Employers From Refusing Rehire to an Employee Terminated for Workplace Misconduct Would Seriously Undermine Their Ability To Enforce Conduct Standards	21
CONCLUSION	23

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Brohm v. JH Properties, Inc., 149 F.3d 517 (6th Cir. 1998)	11
Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001)	12, 13
Calef v. Gillette Co., 322 F.3d 75 (1st Cir. 2003)	11
Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995)	12
Den Hartog v. Wasatch Academy, 129 F.3d 1076 (10th Cir. 1997)	12
Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995)	10
Flynn v. Raytheon Co., 94 F.3d 640, 1996 WL 468496 (1st Cir. Aug. 19, 1996)	15
Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047 (5th Cir. 1998)	5, 10
Harris v. Polk County, Iowa, 103 F.3d 696 (8th Cir. 1996)	5, 15
Hill v. Kansas City Area Transportation Authority, 181 F.3d 891 (8th Cir. 1999)	11
Jones v. American Postal Workers Union, 192 F.3d 417 (4th Cir. 1999)	12
Leary v. Dalton, 58 F.3d 748 (1st Cir. 1995)	9
Leonberger v. Martin Marietta Materials, Inc., 231 F.3d 396 (7th Cir. 2000)	11
Little v. F.B.I., 1 F.3d 255 (4th Cir. 1993)	9
Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995)	9, 10
Martin v. Barnesville Exempted Village School District Board of Education, 209 F.3d 931 (6th Cir. 2000)	5, 8
Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)	21

TABLE OF AUTHORITIES—Continued

	Page
Newland v. Dalton, 81 F.3d 904 (9th Cir. 1996) ...	13
Palmer v. Circuit Court of Cook County, Ill., 117 F.3d 351 (7th Cir. 1997)	11
Pernice v. City of Chicago, 237 F.3d 783 (7th Cir. 2001)	5, 8
Peyton v. Otis Elevator Co., 72 F. Supp.2d 915 (N.D. Ill. 1999)	15
Renaud v. Wyoming Department of Family Services, 203 F.3d 723 (10th Cir. 2000)	5, 9
Salley v. Circuit City Stores, Inc., 160 F.3d 977 (3d Cir. 1998)	12
Thomas v. Mississippi State Department of Health, 934 F. Supp. 768 (S.D. Miss. 1996)	16
Toyota Motor Manufacturing, Inc., v. Williams, 534 U.S. 184 (2002)	22
Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996)	10
FEDERAL STATUTES	
Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*	*passim*
42 U.S.C. §§ 12111–12117	*passim*
42 U.S.C. § 12112(a)	6, 8
42 U.S.C. § 12114(c)	5
42 U.S.C. § 12114(c)(1)	7
42 U.S.C. § 12114(c)(2)	7
42 U.S.C. § 12114(c)(3)	7
42 U.S.C. § 12114(c)(4)	7
Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701 *et seq.*	7
41 U.S.C. § 701(a)	7

TABLE OF AUTHORITIES—Continued

	Page
Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793	2, 9
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*	20
FEDERAL REGULATIONS	
56 Fed. Reg. 35726 (July 26, 1991)	13
OTHER AUTHORITIES	
Automatic Data Processing, Inc. (ADP) Hiring Index (2001)	20
BNA Human Resources Library, POL:25:701	20
EEOC Compl. Man. (BNA) § 902.2 n.11 (Nov. 2002)	5, 13
EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Mar. 25, 1997), *reprinted in* EEOC Compl. Man. (BNA) 902:0131	14
EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), *reprinted in* EEOC Compl. Man. (BNA) 902:0151	14
Institute for a Drug-Free Workplace, *What American Employees Think About Drug Abuse* (1995)	22
Johns Hopkins Health System, *Employee Handbook — Non-Represented Employees*	19
Mt. Vernon Community School Corp., *Policies and Bylaws*	19

TABLE OF AUTHORITIES—Continued

Page

Office of Applied Studies, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services, *Results from the 2001 National Household Survey on Drug Abuse* (Aug. 2002) 21, 22

United States Department of Labor, *What Works: Workplaces Without Alcohol and Other Drugs* (1994) 19

University of Nebraska Lincoln, *Guidelines for Recruitment and Hiring of Office/Service Employees* 20

Xanterra Parks and Resorts, *Mount Rushmore Drug and Alcohol Policy* 19

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief *amici curiae*. The brief supports reversal of the decision below and thus supports the position of Petitioner Raytheon Company, *et al.*[1]

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes approximately 340 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's member companies and many of the Chamber's members are employers subject to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities.

EEAC's and the Chamber's members include chemical and other manufacturing companies, oil refineries, airlines, pharmaceutical manufacturers, railroads, health care providers, nuclear power companies, defense contractors, and many others. Many if not all of these companies have adopted standards governing the conduct of employees in the workplace, including rules prohibiting the use of, or being under the influence of, illegal drugs and alcohol on the job. These rules are grounded in such legitimate business considerations as the need to prevent workers from killing or injuring themselves, coworkers or members of the public due to the deleterious effects of drugs or alcohol. For many of these companies, an employee's rule infraction that is severe enough to warrant termination also makes the offender ineligible for rehire at a later date.

Thus, EEAC's and the Chamber's members will be directly affected by the Court's decision in this case. The court below concluded that an employer's policy against rehiring former employees who were terminated for violating a company conduct rule, as applied to an individual terminated for illegal drug use, violates the ADA as a matter of law. It thus creates an automatic "back door" for former employees to whom the front door is barred due to their violation of a company rule.

The decision below turns disability discrimination law upside down, making it a shield behind which anyone who claims "my disability made me do it" can hide from accountability for his or her actions. It rewards drug abuse by creating a preference for rehire in favor of those who were legitimately terminated for using drugs on the job. Moreover, it confers potential ADA protection on any employee who is terminated for criminal actions such as violence towards a coworker, theft of company property or funds, and the like.

EEAC's and the Chamber's experience with the issues before the Court extends well beyond the context of the instant case. Thus, this brief brings to the attention of the Court relevant matter not already brought to its attention by the parties.

STATEMENT OF THE CASE

Joel Hernandez was a Calibration Service Technician for Hughes Missile Systems Company [2] when he tested positive for cocaine in a July 1991 drug test. Pet. App. 2a. The company gave him the option of resigning in lieu of termination, and he did. *Id.*

In January 1994, Hernandez again applied for a job at Hughes. *Id.* The company rejected his application because his record indicated that he was ineligible for rehire due to personal misconduct, *i.e.*, violation of a company policy that mandated termination or resignation in lieu of termination. Pet. App. 4a. Hernandez subsequently filed a charge with the Equal Employment Opportunity Commission, contending that Hughes discriminated against him in violation of Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111–12117, on the basis of his having a record of a drug addiction. *Id.* When he subsequently sued Hughes on the same grounds, the trial court granted summary judgment in favor of Hughes. Pet. App. 16a–17a. Hernandez appealed.

The Ninth Circuit reversed, holding that Hughes' policy against rehiring any former employee terminated for violating a conduct rule violates the ADA because it "serves to bar the re-employment of a drug addict despite his successful rehabilitation." Pet. App. 11a. The Court rejected Hughes' argument that the policy is nondiscriminatory because it does not single out employees with a record of drug addiction or treat them any differently from other employees fired for using drugs or for violating other conduct rules that require termination and a bar from rehire, such as rules against fighting or

[2] Hughes Missile Systems Company has since been acquired by Raytheon Company. Pet. App. 1. Since the relevant events occurred prior to the acquisition, we will refer to Petitioners collectively as "Hughes" or "the company."

stealing. Pet. App. 10a–11a. Hughes sought and was granted this Court's review of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, does not prevent an employer from enforcing legitimate rules governing workplace conduct, nor does it preclude disciplinary action, such as termination and refusal to rehire, as a consequence of violating such rules. While the ADA prohibits employment discrimination on the basis of disability, it permits a clear distinction between disability discrimination, which is prohibited, and enforcement of legitimate conduct rules, such as those barring workplace substance abuse, which is not. *E.g., Pernice v. City of Chicago*, 237 F.3d 783, 785 (7th Cir. 2001); *Martin v. Barnesville Exempted Village Sch. Dist. Bd. of Educ.*, 209 F.3d 931, 934 (6th Cir. 2000); *Renaud v. Wyoming Dep't of Family Servs.*, 203 F.3d 723, 730 (10th Cir. 2000); *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998). Indeed, the ADA explicitly authorizes employers to enforce rules against drug and alcohol use, even if the user is a drug addict or alcoholic who may be a protected "individual with a disability" under the law. 42 U.S.C. § 12114(c). The rationale underlying these principles is that the ADA does not excuse conduct by an individual with a disability that would not be tolerated in an individual without a disability. EEOC Compl. Man. (BNA) § 902.2 n.11 (Nov. 2002).

For the same reasons, applying a rule that makes a former employee "ineligible for rehire" if he or she was terminated for violating a workplace conduct rule likewise does not violate the law. In both cases, the reason for the action is the conduct—violation of the work rule—rather than any underlying explanation or excuse for the conduct. *E.g., Harris v. Polk County*, Iowa, 103 F.3d 696, 697 (8th Cir. 1996).

Employers establish workplace conduct rules for a variety of legitimate reasons, including safety, productivity, and legal requirements. When a conduct violation warrants an employee's termination, many employers have elected also to consider that employee as ineligible for rehire, thus strengthening the force and effect of their conduct rules. This practice is particularly common when the infraction involves illicit drug abuse in the workplace. Because the decision below provides an automatic "second chance" for anyone terminated for misconduct if they can claim the misconduct stemmed from a disability, it should be reversed.

ARGUMENT

I. AN EMPLOYER'S APPLICATION OF ITS "INELIGIBLE FOR REHIRE" POLICY TO A FORMER EMPLOYEE TERMINATED FOR VIOLATING A WORKPLACE CONDUCT RULE SUCH AS A PROHIBITION ON DRUG USE DOES NOT VIOLATE THE AMERICANS WITH DISABILITIES ACT

A. The ADA Does Not Shield Employees Who Violate Company Conduct Rules From the Consequences of Their Actions

1. Employers May Enforce Rules Against Drug and Alcohol Use and Other Workplace Misconduct, Even if the Misconduct Is Traceable to a Disability

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117, prohibits discrimination in employment against a "qualified individual with a disability" on the basis of a disability. 42 U.S.C. § 12112(a). It does not shelter employees or former employees from the consequences of their misconduct, regardless of whether their wrongdoing may be somehow connected to a disability.

Accordingly, employers are well within their rights to take disciplinary action against an employee who violates a workplace conduct rule, whether or not the conduct may have something to do with a disability.

Indeed, the ADA explicitly provides that an employer may forbid all employees from using or being under the influence of illegal drugs or alcohol in the workplace. 42 U.S.C. § 12114(c)(1) and (2). It specifically allows employers to hold employees to the standards established by the Drug-Free Workplace Act of 1988 [3], 42 U.S.C. § 12114(c)(3), which requires federal contractors to commit to take various steps to prevent workplace drug use, including notifying employees of the employer's policy against workplace drug use and taking disciplinary action for violating the policy. 41 U.S.C. § 701(a). Moreover, the ADA unambiguously permits employers to enforce its rules against substance abuse, stating that an employer:

> may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee . . . .

42 U.S.C. § 12114(c)(4). Accordingly, the ADA confirms an employer's right to discipline an employee for substance abuse, even though the employee may have a disability due to drug abuse or alcoholism. Thus, when Hernandez came to work at Hughes with illegal drugs in his system, he violated a company rule of conduct for which the ADA expressly permits employers to take disciplinary action, even if Hernandez was a drug addict at the time.

As does the statute, the circuit courts of appeals also have acknowledged the fundamental distinction between a

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[3] 41 U.S.C. §§ 701 *et seq.*

disability itself and conduct that allegedly is caused by a disability. Recognizing that the ADA prohibits discrimination "because of" a disability, 42 U.S.C. § 12112(a), these courts have explained that where an employer takes disciplinary action against an employee for workplace misconduct that may be related to a disability, the decision is still "because of" the conduct, not the disability, and therefore does not violate the ADA.

The Seventh Circuit explained this distinction in *Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001). The City fired Pernice, a 20-year City employee, after he was arrested and charged with disorderly conduct and possession of cocaine. Pernice sued the City under the ADA, claiming that he had been discharged due to his disability of drug addiction, since his drug possession was 'an integral part' of his disability. *Id.* at 784. The Seventh Circuit, upholding the trial court's dismissal of the complaint, observed that "[i]t is well-established that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability. This rule is particularly applicable to employees who violate rules relating to drug or alcohol abuse." *Id.* at 785 (citation omitted).

In so doing, the Seventh Circuit rejected Pernice's argument that the ADA protected him because his disability—drug addiction—caused his actions, stating that "Pernice made a conscious choice to actually possess drugs. We therefore have little trouble separating his misconduct from his alleged disability." *Id.* at 787.

Courts have reached the same conclusion with respect to workplace rules against alcohol abuse. In *Martin v. Barnesville Exempted Village School District Board of Education*, 209 F.3d 931, 934 (6th Cir. 2000), the Sixth Circuit concluded that even if the school district "regarded" the plaintiff as an alcoholic, it had a legitimate, nondiscrimina-

tory reason for refusing to place him in a bus driver position after he was caught drinking on the job. Similarly, in *Renaud v. Wyoming Department of Family Services*, 203 F.3d 723, 730 (10th Cir. 2000), the Tenth Circuit rejected an ADA claim challenging the dismissal, pursuant to the employer's substance abuse policy, of a school superintendent who came to work drunk, stating that "ADA protection . . . does not extend to an alcoholic's use of alcohol on the job."

This interpretation dates back to the Rehabilitation Act of 1973, the predecessor to the ADA. In *Little v. F.B.I.*, 1 F.3d 255, 258 (4th Cir. 1993), the Fourth Circuit noted that cases applying the Rehabilitation Act "have considered the issue of misconduct as distinct from status as an alcoholic or drug addict."[4] The First Circuit concluded that a civilian Navy employee who was fired after being jailed for driving while intoxicated was discharged for his unauthorized absence, not his alcoholism. *Leary v. Dalton*, 58 F.3d 748 (1st Cir. 1995). When the University of Tennessee fired an assistant football coach after his arrest for driving under the influence of alcohol and public intoxication, the Sixth Circuit concluded that "the district court correctly focused on the distinction between discharging someone for unacceptable misconduct and discharging someone because of the disability." *Maddox v. University of Tennessee*, 62 F.3d 843, 847 (6th Cir. 1995).

The reasoning underlying all of these decisions is that neither the ADA nor the Rehabilitation Act excuses conduct by an individual with a disability that would not be tolerated in an individual without a disability. As the Tenth Circuit has

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[4] The Fourth Circuit also related the development of the regulations interpreting the Rehabilitation Act, and particularly the question of whether an alcoholic or drug addict was covered by the Act at all. When the Secretary of Health, Education and Welfare asked the opinion of the Attorney General, he concluded that both were protected by the law, but "he made clear that the Act does not protect alcoholics or drug addicts from the consequences of their misconduct." *Little*, 1 F.3d at 258.

said, "We cannot adopt an interpretation of the statute which would require an employer to accept egregious behavior by an alcoholic employee when that same behavior, exhibited by a nondisabled employee, would require termination." *Williams v. Widnall*, 79 F.3d 1003, 1007 (10th Cir. 1996). The Sixth Circuit explained that "to hold otherwise, an employer would be forced to accommodate all behavior of an alcoholic which could in any way be related to the alcoholic's use of intoxicating beverages; behavior that would be intolerable if engaged in by a sober employee or, for that matter, an intoxicated but non-alcoholic employee." *Maddox*, 62 F.3d at 847. Indeed, the Seventh Circuit has envisioned the potentially harmful consequences of a contrary holding:

> To impose liability under the Americans with Disabilities Act or the Rehabilitation Act in such circumstances would indirectly but unmistakably undermine the laws that regulate dangerous behavior. It would give alcoholics and other diseased or disabled persons a privilege to avoid some of the normal sanctions for criminal activity. It would say to an alcoholic: We know it is more difficult for you to avoid committing the crime of drunk driving than it is for healthy people, and therefore we will lighten the sanction by letting you keep your job in circumstances where anyone else who engaged in the same criminal behavior would lose it.

Despears v. Milwaukee County, 63 F.3d 635, 637 (7th Cir. 1995).

The same analysis applies to conduct violations by individuals with other disabilities as well. In *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998), the Fifth Circuit held that an employee's violation of the company's workplace violence policy constituted a legitimate, nondiscriminatory business reason for his termination, even if his conduct was caused by post-traumatic stress disorder, noting that "[t]he cause of Hamilton's discharge was not discrimination based on PTSD but was

rather his failure to recognize the acceptable limits of behavior in a workplace environment"). Similarly, the Seventh Circuit ruled that an employer terminated an employee because she threatened to kill a coworker and not because of her mental illness, noting that "if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act." *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997) (citations omitted). As the First Circuit said recently, "Put simply, the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability. Such an employee is not qualified." *Calef v. Gillette Co.*, 322 F.3d 75, 87 (1st Cir. 2003) (footnote omitted).

Nor have the courts limited this analysis to incidents of workplace violence or threats of violence. Falling asleep on the job violates another common conduct rule, and can be related to a medical condition, yet employers need not overlook the infraction. The Sixth Circuit has concluded that a hospital that terminated an anesthesiologist with sleep apnea who repeatedly dozed off on the job did not violate the ADA, noting that there was no evidence that the hospital had treated him any differently than it would have "a physician who slept on the job for another reason, such as staying up late every night to watch television." *Brohm v. JH Properties, Inc.*, 149 F.3d 517, 522 (6th Cir. 1998). In *Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891, 894 (8th Cir. 1999), the Eighth Circuit concluded that where an employee waited until after she twice fell asleep on the job, "a work rule violation she knew would mandate her discharge," before requesting accommodation, the ADA did not require her employer to grant her another chance to better control her own treatable condition. *See also Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396 (7th Cir. 2000)

(employer who terminated a front loader driver with sleep apnea for sleeping on the job did not violate the ADA).

Indeed, as the Fourth Circuit has said, "[t]he law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability." *Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (holding that employer did not violate the ADA by terminating an employee who threatened his supervisor's life).[5]

Even the Ninth Circuit repeatedly has recognized the dichotomy between a disability and workplace misconduct. *See Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir. 1995) (noting that "[c]ourts have recognized a distinction between termination of employment because of misconduct and termination of employment because of a disability," and applying that distinction to hold that the termination of employees for using or being under the influence of drugs in the workplace did not violate the ADA). *See also Brown v.*

[5] Two circuits have suggested that because the ADA explicitly permits employers to hold substance abusers to the same qualification standards as other workers, but says nothing about other disability-related conduct, the rule establishing a dichotomy between conduct and disability applies only to situations involving substance abuse. *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997); *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998). Even in these circuits, however, an employer may enforce its rules against workplace misconduct under most circumstances. As the Tenth Circuit explained, the ADA's provisions that an employer need not make an accommodation that would impose an "undue hardship," nor retain an employee who would pose a "direct threat," establishes that there are certain levels of disability-caused conduct that need not be tolerated or accommodated by employers. *Den Hartog*, 129 F.3d at 1087. Most workplace conduct that would substantiate a decision to terminate should fall within this category; for example, workplace violence, harassment, and theft all fall well beyond the level of conduct that employers should have to tolerate.

Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001); *Newland v. Dalton*, 81 F.3d 904 (9th Cir. 1996).

The decision below overlooks this crucial distinction, treating Hernandez' workplace cocaine use as a mere incidental consequence of his possible drug addiction. Indeed, the Ninth Circuit described former employees terminated for drug use as individuals "whose only work-related offense was testing positive" because of their addiction. Pet. App. 13a. On the contrary, the work related offense was illegal drug use, and it is immaterial whether or not the offending employee happens to have an addiction.

2. EEOC Guidance Confirms That the ADA Permits Enforcement of Conduct Standards and Does Not Require Pardons Due to Disability

The Equal Employment Opportunity Commission, the federal agency with enforcement authority over Title I of the ADA, consistently has interpreted the statute as permitting an employer to enforce reasonable conduct standards, as long as they are applied consistently, even though it may mean that an employee faces discipline for conduct that can be traced to a mental or physical condition. For example, the preamble to the agency's 1991 regulations interpreting the ADA states that "employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and non-disabled, to the same performance and conduct standards." 56 Fed. Reg. 35726, 35733 (July 26, 1991). In Section 902 of the agency's Compliance Manual, which addresses the definition of "Disability" under the ADA, the EEOC states that an employer "does not have to excuse [an employee's] misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees." EEOC Compl. Man. (BNA) § 902.2 n.11 (Nov. 2002).

The EEOC included a lengthy discussion of conduct issues in its *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, issued in 1997. There, the agency confirmed that an employer may hold individuals with disabilities to conduct standards that are "job-related and consistent with business necessity" as long as they do so consistently—that is, as long as they would mete out the same discipline to an employee with no disability. The agency mentioned company policies against workplace violence, theft, and destruction of property as examples of conduct rules that would be considered job-related and consistent with business necessity. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (Mar. 25, 1997) at 30-32, *reprinted in* EEOC Compl. Man. (BNA) 902:0131, 902:0139-40. The agency stated explicitly that an employer is not required to excuse past misconduct, *e.g.*, by rescinding a discharge once it learns that the conduct may have been caused by a disability. *Id.* at 31.

Similarly, the EEOC has confirmed that an employer's "reasonable accommodation" obligation under the ADA does not include forgiving past infractions. In enforcement guidance, the agency states that although an employer sometimes may have to make a reasonable accommodation to allow a qualified individual with a disability to meet a conduct standard in the future, it need not do so "where the punishment for the violation is termination." *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002) at 36, *reprinted in* EEOC Compl. Man. (BNA) 902:0151, 902:0167 (footnote omitted). As the agency explained, "[s]ince reasonable accommodation is always prospective, an employer is not required to excuse past misconduct, even if it is the result of the individual's disability." *Id.* (citing *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995)).

Accordingly, the federal agency with enforcement responsibilities for Title I of the ADA has interpreted that law as permitting employers to discipline employees for violating conduct rules, even if the misconduct may be traceable to a disability.

B. For the Same Reasons, Refusing To Rehire a Former Employee Terminated for Workplace Misconduct Does Not Violate the ADA

As explained above, terminating an employee for violating a workplace conduct rule does not violate the ADA, even if the conduct was somehow caused by or related to a disability. For the same reasons, applying a rule that makes a former employee "ineligible for rehire" if he or she was terminated for violating a workplace conduct rule likewise does not violate the law. In both cases, the reason for the action is the conduct—violation of the work rule—rather than any underlying explanation or excuse for the conduct.

Several circuit courts of appeals, in direct contrast to the Ninth Circuit below, have recognized that an employer's decision to disqualify former employees from eligibility for rehire if they were terminated for misconduct does not constitute disability discrimination, even if the underlying conduct allegedly was related to a disability. *E.g., Harris v. Polk County, Iowa*, 103 F.3d 696, 697 (8th Cir. 1996) (holding that employer did not violate ADA by refusing to consider for rehire employee who had been fired several years earlier after criminal conviction for shoplifting, even though she contend-ed that her shoplifting was caused by mental problems that had been resolved). *See also Flynn v. Raytheon Co.*, 94 F.3d 640, 1996 WL 468496 (1st Cir. Aug. 19, 1996) (unpublished) (former employee terminated for using alcohol in violation of workplace conduct rule was not entitled to second chance upon seeking reinstatement). A number of district courts have reached the same correct conclusion. *E.g., Peyton v. Otis Elevator Co.*, 72 F. Supp.2d 915 (N.D. Ill.

1999) (employer did not violate ADA by refusing to rehire former employee terminated for absenteeism caused by alcoholism); *Thomas v. Mississippi State Dep't of Health*, 934 F. Supp. 768 (S.D. Miss. 1996) (ADA did not require employer to overlook former employee's prior termination for absenteeism and negligence due to crack cocaine addiction).

Since, as shown above, the ADA permits an employer to terminate an employee for workplace misconduct regardless of disability, it also permits an employer to make employees who are terminated for conduct violations ineligible for rehire. Both rules are applied consistently to all employees who commit the same infraction, and both acknowledge an employer's inherent right to make and enforce legitimate rules regulating workplace conduct.

The decision below missed the point by focusing incorrectly on Hernandez' addiction during his employment and his purported rehabilitation after being terminated from Hughes. As the EEOC has said, the ADA does not require employers to forgive past misconduct. Thus, whether or not Hernandez was still a drug addict—or even whether he was using drugs at all—when he applied for rehire was irrelevant to his ineligibility, which was based solely on his misconduct during his previous sojourn with Hughes. Stated in different terms, Hernandez' ineligibility for rehire was based on his violation of Hughes' rule against drug use in the workplace, not on his record of having a drug addiction.

That the Ninth Circuit misunderstood the important distinction between refusal to rehire due to violation of a workplace conduct rule and disability discrimination is further shown by the comment at n.16 of its opinion. Pet. App. 11a n.16. There, the court finds it "interesting" that an applicant who tests positive for drugs is ineligible to re-apply for 12 months, while the employee who tests positive is ineligible forever. The employee who comes to work with drugs in his or her system has violated a work rule, placed

company equipment, product, and perhaps even lives in jeopardy, and abused the company's trust. The applicant who tests positive at the pre-employment stage has damaged only his own career options.

A ruling that the ADA invalidates an employer's "no rehire" policy as applied to drug addicts and others with disabilities effectively gives those individuals a hiring preference over other former employees who also broke workplace rules and received the same punishment. It forces employers to overlook and forgive conduct that they would never be expected to tolerate in a non-disabled individual. The Ninth Circuit's ruling should be reversed.

II. EMPLOYERS HAVE AN IMPORTANT BUSINESS NEED FOR THE ABILITY TO REFUSE TO REHIRE FORMER EMPLOYEES WHO WERE DISCHARGED FOR VIOLATING WORKPLACE CONDUCT RULES

A. Employers Establish Work Rules for Legitimate and Nondiscriminatory Business Reasons

Many if not all employers have adopted rules that establish minimum standards for employee conduct in the workplace. Safety concerns provide one reason for having such rules. A worker who is fighting, threatening violence, engaging in horseplay that distracts other workers, or working carelessly or without protective equipment, can cause an accident, injuring himself, coworkers, and perhaps the public. Productivity expectations are another reason, giving rise to rules against insubordination, excessive absenteeism, repeated tardiness, and excessive personal telephone calls. Some conduct rules, such as those governing respect for coworkers, use of employer-provided e-mail, and the like, are based at least in part on legal requirements, such as potential employer

liability for workplace harassment. Prohibitions against the use of drugs and alcohol fall into all three categories.

In virtually every company, violation of conduct rules can lead to discipline up to and including termination. Enforcement of a conduct rule not only supports the legitimate goal underlying the rule itself, but encourages future compliance by other employees.

B. Considering Employees Who Have Been Terminated for Misconduct as Ineligible for Rehire Is a Common Practice Grounded in Legitimate Business Purposes

Like Hughes in this case, many companies as a matter of policy consider an employee's termination for violating a work rule as a permanent bar to eligibility for rehire. Terminations for violating rules against using drugs or alcohol, threatening or assaulting another employee, bringing a firearm to work, stealing, or sexual harassment typically trigger such a policy. Indeed, any infraction that is serious enough to warrant termination also could be considered serious enough to make the individual ineligible for rehire at any future date.

The customary practice of marking on such an employee's file that he or she is "ineligible for rehire" serves three purposes. First, it allows those who may be involved in that individual's future application to make appropriate decisions without revisiting the original infraction, thus confirming the finality of business decisions that were appropriate when made. Second, it provides a neutral means of ensuring that anyone who has been fired once for an infraction so severe that it warranted the ultimate discipline is not accidentally rehired by someone who lacks access to the record. Third, it actually protects the individual, since the designation "ineligible for rehire" is sufficient unto itself and obviates the need for someone who was not involved in the original

decision to delve into all of the often unsavory details surrounding it.

The practice is particularly common with respect to former employees terminated for violation of a company's prohibitions against drug abuse. For example, the U.S. Department of Labor, as part of its "Substance Abuse Information Database," which is designed as a resource for employers, maintains a booklet incorporating a model "drug free" policy which provides that employees terminated for drug use following company sponsored rehabilitation "will be ineligible for rehire." United States Dep't of Labor, *What Works: Workplaces Without Alcohol and Other Drugs* (1994) (Appendix A: Workplace Substance Abuse Policy Models, Sample 2: Drug-Free Policy of (Company B), at 23 [p.7 of .pdf]) [6].

Such varied employers as a concessionaire at Mt. Rushmore [7], the Mt. Vernon Community School Corporation in Fortville, Indiana [8], and the Johns Hopkins Health System (which marks *any* employee discharged for any reason other than job performance ineligible for rehire) [9], have all adopted the same practice. So has a Southeastern utility company, which provides in its policy that "[A]n employee involuntarily terminated by the Company, regardless of the

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[6] *available at http://said.dol.gov/SAID_Attachments/553said5.pdf.*

[7] Xanterra Parks and Resorts, *Mount Rushmore Drug and Alcohol Policy, available at http://www.coolworks.com/rushmore/policy.htm* (last visited May 6, 2003).

[8] Mt. Vernon Community School Corp., *Policies and Bylaws, available at http://www.mvcsc.k12.in.us/4000.html#eap* (last visited May 6, 2003).

[9] Johns Hopkins Health System, *Employee Handbook—Non-Represented Employees* (Separation), *available at http://www.hopkinsmedicine.org/jhhr/hbook_nb.htm#nbu36* (last visited May 6, 2003).

reason for termination, is ineligible for reemployment."[10] The University of Nebraska at Lincoln does the same.[11] Indeed, a company that performs pre-employment screening reported last year that 11% of the employers the company contacted as part of the 2.6 million background verifications it performed in the year 2001 reported applicants ineligible for rehire. Automatic Data Processing, Inc. (ADP) Hiring Index (2001).[12]

Employers adopt such policies for their own protection and that of their other employees and the public. An infraction serious enough to warrant the ultimate punishment—termination—is likely to be an egregious one. "No rehire" policies essentially guarantee that there will be no reoccurrence.

Where the situation involves an infraction of a rule designed to promote safety, such as those against substance abuse, workplace violence, and the like, "no rehire" policies guard other employees and the general public from physical injury, and the employer from legal liability and public recriminations. Similarly, an employee who has engaged in sexual harassment that is either severe or repeated is likely to be terminated, and a "no rehire" rule protects his or her victims from further abuse and the company from liability under Title VII.[13] Some company work rules protect the

[10] BNA Human Resources Library, POL:25:701 *available at http://hrlibrary.bna.com* (RESOURCES Sample Policies and Forms POL:25:701).

[11] University of Nebraska Lincoln, *Guidelines for Recruitment and Hiring of Office/Service Employees available at http://busfin.unl.edu/hr/oshiringguidelines.htm*, at 11.

[12] *available at http://www.investquest.com/iq/a/aud/ne/news/adpmisleading.htm.*

[13] Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination in employment on the basis of

company's property interests, *e.g.*, rules against stealing tools or other items belonging to the company. When an employee is terminated for violation of rules such as these, a "no rehire" rule simply prevents the company from unintentionally giving the thief another opportunity to steal.

An employer has a significant investment in every employee, in terms of the resources spent to recruit, hire and train each individual in the its workforce. Accordingly, the decision to terminate an employee necessarily is a difficult one, because the employer essentially loses its investment. For the same reasons, having a rule that some former employees are ineligible for rehire essentially means a lost opportunity to recoup the investment. In making both the decision to terminate and the decision to establish a "no rehire" rule, an employer has made a business judgment that the risk of continuing to employ or reemploying this person outweighs the value of the investment.

C. A Decision Preventing Employers From Refusing Rehire to an Employee Terminated for Workplace Misconduct Would Seriously Undermine Their Ability To Enforce Conduct Standards

The decision below results in an automatic right to a "second chance" to any worker fired for misconduct, even drug use,[14] if he or she can somehow tie the infraction to a

membership in various protected classes, and includes sexual harassment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[14] Drug abuse remains a serious problem for employers. According to the 2001 *National Household Survey on Drug Abuse* report, published by the U.S. Department of Health and Human Services last August, "most drug users were employed. Of the 13.4 million illicit drug users aged 18 or older in 2001, 10.2 million (76.4 percent) were employed either full or part time." Office of Applied Studies, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services, *Results from the 2001 National Household Survey*

disability. Based on the Ninth Circuit's reasoning, an employer would be liable under the ADA if it refused to rehire a former employee who was terminated for attacking a coworker or customer, for embezzling company funds, for sexual harassment, for extreme or repeated carelessness, for boisterous and disruptive behavior, for execrable performance, or any number of other legitimate reasons, as long as the former employee can establish that the misconduct stemmed from a disability. Even if the would-be plaintiff fails to qualify as an "individual with a disability" under the ADA and this Court's decision in *Toyota Motor Mfg., Inc., v. Williams*, 534 U.S. 184 (2002), the employer will still have faced the threat, or indeed the fact, of costly litigation merely because it sought to uphold a legitimate work rule it established in order to run its business properly.

Accordingly, affirming the decision below would tie the hands of every employer that desires to maintain discipline in its workforce, to guard against safety hazards, comply with legal requirements, ensure product and service quality, maintain its reputation, and promote an atmosphere that is conducive to retaining good employees. No termination will ever be final. In addition, the Ninth Circuit's rule also has the consequence of placing employers in the untenable position of having to consider for rehire former employees who present a known and demonstrated hazard.

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on Drug Abuse (Aug. 2002), *available at http://www.samhsa.gov/oas/NHSDA/2k1NHSDA/vol1/Chapter2.htm*, at 21. According to a 1995 survey by the Gallup Organization, commissioned by the Institute for a Drug-Free Workplace, 35% of employees surveyed responded that they were aware of illicit drug use by their coworkers on-the-job. Institute for a Drug-Free Workplace, *What American Employees Think About Drug Abuse* (1995) (Figure 13: Awareness of On-The-Job Illicit Drug Use By Co-Workers), *available at http://www.drugfreeworkplace.org/survey/page23.html.*

The decision below thus undermines the best practices of good employers, who maintain progressive discipline procedures that give employees every chance to succeed. It also counteracts those efforts of good employers who, as Hughes did here, provide and pay for rehabilitation for substance-abusing employees and resort to termination only after such efforts fail.

CONCLUSION

For the reasons set forth above, the *amici curiae* Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully request that the decision below be reversed.

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